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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY GIRON,

Defendant and Appellant.

B212985

(Los Angeles County
Super. Ct. No. PA059698)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Alice C. Hill, Judge. Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jimmy Giron on one count of attempted willful, deliberate and premeditated murder of a peace officer, 10 counts of aggravated assault upon a peace officer, one count of feloniously evading a pursuing peace officer and one count of making a criminal threat.¹ Giron was sentenced to an indeterminate term of life with the possibility of parole for attempted murder (count 17) and a consecutive five year term for assault with a deadly weapon on a peace officer (count 3). The sentences for all other counts, including making a criminal threat, were ordered to run concurrently or stayed. On appeal Giron contends only there is insufficient evidence to support his conviction for making a criminal threat against his former girlfriend. We affirm.

FACTUAL BACKGROUND

In the early hours of August 1, 2007 Giron got into an argument with his former girlfriend, Ashlee Ricci, at the nightclub where she worked. She demanded that Giron leave, and he complied. Ricci then became concerned that Giron was too intoxicated to drive safely. She kept telephoning him. He finally answered, but abruptly hung up when she suggested he was too drunk to drive. Shortly thereafter Ricci was told by Guillermo Rodriguez, the nightclub security guard, that Giron was at the club and wanted to see her. Rodriguez also informed the nightclub manager, Bert LeFevre, because Giron had entered the nightclub after being told to wait outside.

When Ricci heard Giron was there to see her, she did not know what to expect and was “a little bit” afraid for herself. According to Ricci, Giron had a volatile temper, which was made worse by alcohol. If Giron felt provoked or intimidated while under the influence, he was prone to sudden and uncontrollable violence. Ricci had reported incidents of Giron’s physical abuse to police during their eight-year relationship.

Alerted that Giron was inside the nightclub, LeFevre escorted him outside accompanied by Rodriguez. Ricci followed them through the back door. When they all stopped to talk, Giron was close to LeFevre, who was at the back door. Giron was

¹ The jury also found Giron was sane at the time of the offenses.

standing about five or six feet away from Ricci, who was on a ramp leading to the outside patio.

Giron was visibly upset and began yelling profanities at Ricci, complaining about her repeated phone calls to him. Ricci explained she was only concerned for his welfare. Giron continued to rant, and Ricci urged him to leave. Giron told Ricci he was “going to fuck her up,” that “it didn’t matter who was standing there with [her],” and that he “would do whatever he felt he had to do or needed to do.” Giron also warned Ricci in Spanish to “watch her back.”²

LeFevre demanded that Giron leave, adding he was no longer allowed inside the nightclub. Giron responded to the effect that he could “get to [Ricci] if he wanted.” Giron then moved toward LeFevre and Ricci and attempted to hit LeFevre, who avoided the punch.³ The two men scuffled, and Giron grabbed a valet parking sign as he was backing away. He first swung and then threw the sign at LeFevre. Giron eventually got into his van and drove away. Ricci reentered the nightclub and suffered “a panic attack, anxiety.”

About five minutes later, Giron drove into the parking lot and rammed Ricci’s car with his van. The collision was reported to LeFevre. He went outside, saw Ricci’s car and telephoned the police emergency number.⁴ Ricci was with LeFevre when he made the call. While LeFevre was on the phone, Giron slammed into Ricci’s car two more times. He then backed up and drove the van toward LeFevre, Ricci and others who were

² According to police investigators, Ricci reported Giron had threatened to kill her. However, Ricci insisted at trial that Giron made no such threat, and she denied telling police he threatened to kill her.

³ Rodriguez testified it seemed Giron was “after both of them.”

⁴ A transcript of the police emergency call was admitted into evidence.

standing on or near the outside patio before crashing into the patio gate. After again backing up, Giron struck another car and nearly hit the parking attendant before fleeing.⁵

DISCUSSION

1. *Standard of Review*

To assess a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. *Substantial Evidence Supports Giron’s Conviction for Making a Criminal Threat Against Ricci*

Penal Code section 422⁶ provides a criminal threat occurs when a person “willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under

⁵ Giron led police on a high speed chase that ended in a residential area where he backed his van into two pursuing police cars.

⁶ Statutory references are to the Penal Code.

the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.” Although it uses slightly different language, CALCRIM No. 1300 as given in this case correctly defined the elements of the crime. The instruction also properly explained that “sustained fear” means “a period of time that is more than momentary, fleeting or transitory.” (See *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*).)

Giron does not challenge the propriety of the trial court's instructions, nor does he argue there was insufficient evidence he threatened Ricci with death or great bodily injury or specifically intended her to take it as a threat, although he denies specifically telling Ricci that he would kill her. Rather, Giron argues the evidence at trial does not support the jury's finding his threat to Ricci conveyed a gravity of purpose and immediate prospect of execution and caused her reasonably to be in sustained fear for her own safety.

a. *Giron's threat conveyed a gravity of purpose and immediate prospect of execution*

“The determination whether a defendant intended his or her words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate, and specific that they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on words alone. The parties' history can also be considered as one of the relevant circumstances.” (*People v. Butler* (2000) 85 Cal.App.4th 745, 752; accord, *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432.)

Giron does not deny telling Ricci he was to “going to fuck her up”; “it didn't matter who was standing there with [her]”; he “would do whatever he felt he had to do or needed to do”; and she should “watch her back.” However, Giron argues the circumstances in which these statements were made showed no true threats against Ricci with the immediate prospect of execution, but merely angry utterances. Giron insists he

never physically confronted Ricci, instead directing his anger at other individuals and parked cars.

Section 422 does not require any showing of physical force. A conviction for making a criminal threat in the absence of any display of violence or aggression is entirely proper. (See, e.g., *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1337-1338 [affirming conviction; defendant told prosecution witness, because she had testified against his brother, he was going to talk to members of the street gang he and his brother belonged to]; *People v. Garrett* (1994) 30 Cal.App.4th 962, 965 [conviction of husband who threatened wife over telephone].)

Nonetheless, as in this case, a display of force together with the threat suggests that physical confrontation is imminent under the circumstances. (See *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138.) Giron had a history of domestic violence with Ricci and had a problem controlling his temper, which was exacerbated by alcohol. That night Giron been drinking and was already angry with Ricci before she called him back to the nightclub. When Giron returned, he was primed for a fight with Ricci and unleashed a profanity-laced tirade. Giron was further enraged by Ricci's use of LeFevre's presence as a means to control Giron, if not to protect herself from him. When LeFevre tried to intervene, Giron said he could get to Ricci if he wanted and immediately advanced on both of them, before taking a swing at LeFevre. From these circumstances, the jury could reasonably infer that a physical confrontation with Ricci was imminent. (See *Allen, supra*, 33 Cal.App.4th at p. 1156 [history of domestic violence between defendant and victim provides meaning for threats]; *People v. Gaut, supra*, 95 Cal.App.4th at pp. 1431-1432 [defendant more likely to follow through on threats because of prior violent history].) Ample evidence supports the jury's finding Giron's threat conveyed a gravity of purpose and immediate prospect of execution.

b. *Giron's threat caused Ricci to be in sustained fear*

In *Allen, supra*, 33 Cal.App.4th 1149, the court held the evidence was sufficient to support the "sustained fear" element of section 422 when the defendant, who had previously broken into the victim's home while repeatedly stalking and assaulting her

daughter (his former girlfriend), pointed a gun at the victim, threatened to kill her and was arrested 15 minutes later after the victim called the police. The *Allen* court concluded the 15-minute period between the threat and the defendant's arrest established the victim's reasonably sustained fear because the victim knew about the defendant's prior conduct toward her daughter and had called the police during the earlier incidents. (*Allen*, at pp. 1151-1156.)

Later cases have adopted and applied in a wide variety of situations *Allen*'s definition of sustained fear as a period of time that extends beyond that which is momentary, fleeting or transitory. In *Allen* other incidents that had occurred *before* the threat provided sufficient context to show the victim's fear was reasonably sustained. Other courts have looked at the victim's conduct *after* the threat to determine if the victim's initial fear was sustained for more than a momentary or fleeting period. (E.g., *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1214-1218, 1222 [rejecting claim, inter alia, victim not in sustained fear; evidence established victim had friend stay at her house for protection and reported threats the morning after they were made]; *People v. Mendoza*, *supra*, 59 Cal.App.4th at pp. 1337-1338, 1342 [affirming conviction; victim called police 20 minutes after defendant threatened her with retaliation for testifying against his brother, a fellow gang member; gang member parked outside her house and honked horn; and victim learned other gang members were looking for her]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1008-1010, 1011-1016, 1024 [although trial court erred in failing to define "sustained fear," error harmless when evidence showed victims still afraid an hour after threats after learning defendant had firebombed their apartment]; see also *In re Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1135-1136, 1139-1141 [student's statement "I'm going to get you" and "I'm going to kick your ass" after teacher accidentally hit student while opening door insufficient when no history of animosity between them, student made no threatening gestures and teacher sent student to the office in response, where student apologized].)

Notwithstanding their very different factual circumstances, the common thread in these cases is that in evaluating the evidence supporting a charge of making a criminal

threat, “all of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422.” (*People v. Solis, supra*, 90 Cal.App.4th at p. 1013.) Thus, the jury can properly consider a later action taken by a defendant, as well as the victim’s conduct after the incident, in evaluating whether the crime of making a criminal threat has been committed. (See *id.* at p. 1014.)

Here, the evidence viewed in the light most favorable to the judgment reasonably justifies the jury’s finding that Giron’s threat resulted in Ricci being in fear for more than a “momentary, fleeting or transitory” period. First, Ricci testified, because of Giron’s violent temper, she was fearful upon learning he had come back to the nightclub in response to her telephone calls. Second, she testified Giron’s threats frightened her. To be sure, Ricci contradicted herself and equivocated enough that a contrary inference, as urged by Giron, was also plausible.⁷ However, the jury was free to discount Ricci’s later claims of being unafraid as belied by her behavior toward Giron at the time. The record establishes, when Ricci went outside to see Giron, she never walked up to him, but remained some distance away, beyond or behind LeFevre throughout the encounter. In response to his threat, she kept silent, but suffered a panic or anxiety attack shortly thereafter.

Even if the jury had determined Ricci did not initially take Giron’s threat seriously, the record supports a finding she later experienced sustained fear from his threat as she witnessed Giron ram her car several times in the parking lot. (See *People v. Solis, supra*, 90 Cal.App.4th at p. 1014 [“a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant (e.g., setting fire to the victim’s apartment)”].) Indeed, it was Ricci’s

⁷ After initially testifying she was a bit concerned for herself by Giron’s return, Ricci subsequently testified she was only worried for Rodriguez and LeFevre, fearing that Giron would get into trouble because he was drunk and easily provoked. At another point, Ricci testified she initially took Giron’s threat seriously because he may very well have carried it out, even though she was with Rodriguez and LeFevre. On cross-examination, she testified she did not fear that Giron “would be able to assault her . . . on the spot.”

testimony she “kind of, but not really,” took Giron’s threat “to fuck her up” seriously at the time, but became frightened upon seeing Giron’s “driving and craziness” thereafter.⁸ Ricci also testified she remained in fear of Giron when she was later interviewed by police officers following Giron’s arrest.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

⁸ This testimony was corroborated by the transcript of the police emergency call, which recorded Ricci’s reaction of obvious fear as she watched Giron’s reckless driving in the parking lot.